91-1020

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MASON H. ROSE,

Petitioner,

v.

SUSAN T. FULTZ, ROGER E. HAWKINS, CHRISTA M. HAWKINS, AND HOME SAVINGS OF AMERICA, F.A.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL SECOND DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

1. If a federal default judgment was void when entered, for lack of personal jurisdiction:

(a) Was that voidness retroactively waived by a postjudgment general appearance in the federal court, by filing a Rule 60 motion asking for relief on the merits?

(b) Does a holding of retroactive waiver violate due process?

2. If a federal Court of Appeals dismisses an appeal as moot, but refuses to vacate the judgment or order appealed from (or vacates it nonretroactively) over the appellant's objection:

(a) Does that judgment or order collaterally estop the appellant on issues that he could not appeal?

Does a holding of collateral estoppel on such issues violate due process?

LIST OF PARTIES

No list of parties is required, under Supreme Court Rule 14.1(b), because the names of all parties appear in the caption of the case.

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SUPREME COURT OF THE UNITED STATES

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PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND DISTRICT, DIVISION ONE

Petitioner, MASON H. ROSE, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, Second District, Division One, which affirmed a judgment of the Los Angeles Superior Court that dismissed his action upon sustaining a demurrer without leave to amend.

OPINION BELOW

The opinion of the California Court of Appeal was not certified for publication. A copy of that unpublished opinion, filed

March 5, 1991, appears in Appendix A at pages A 1-16.[1/]

A copy of the Los Angeles Superior Court's Order of Dismissal With Prejudice, filed August 4, 1989, appears in Appendix B at pages A 17-20. That is the judgment entered in favor of Respondents Home Savings and Roger and Christa Hawkins. A similar judgment was entered in favor of Respondent Fultz (A 2).

A copy of the California Court of Appeal's order dated March 25, 1991, denying Petitioner's petition for rehearing, appears in Appendix C at page A 21.

A copy of the California Supreme Court's order filed May 29, 1991, denying Petitioner's petition for review, appears in Appendix D at page 22.

1/ Citations to page numbers preceded by "A" are to pages of the Appendix to this petition. Citations to page numbers preceded by "CT" are to pages of the Clerk's Transcript on Appeal in the California courts.

JURISDICTION

The order of the California Supreme Court (Appendix D) was filed on May 29, 1991. It denied Petitioner's petition for review. This Court's jurisdiction is invoked under Title 28 U.S.C. section 1257, as the review of a final judgment rendered by the highest court of a State in which a decision could be had.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendments 5 and 14 to the United States Constitution are set forth in Appendix E at pages A 23-24.

STATEMENT OF THE CASE

This is an appeal from a judgment for defendants, after a demurrer was sustained without leave to amend. The trial court (the Los Angeles Superior Court) ruled that all of Rose's claims were barred by res judicata or collateral estoppel, based on rulings of federal courts in a previous action by Fultz (one of the respondents)

against Rose.

The California Court of Appeal agreed and affirmed. It then denied Rose's timely petition for rehearing. The California Supreme Court denied Rose's timely petition for review.

Rose's claims all stem from the execution sale of his family home, to satisfy a default judgment against him in the federal District Court for the District of Colorado. Rose's claims do not depend on the underlying facts on which Fultz (the judgment creditor in Colorado) based her action against Rose. Rather they relate to the jurisdiction of the Colorado District Court, and the propriety of the steps taken by Fultz to enforce its judgment.

A. Procedural Background of This Action

Rose's complaint (CT 1-41) alleged that the execution sale of his family home was void and improper. "If the sale was im-

proper," California Code of Civil Procedure ("Cal. CCP") section 701.680 expressly authorizes an action by Rose, as judgment debtor, "to set aside the sale if [as here] the purchaser at the sale is the judgment creditor," and--whether or not the purchaser is the judgment creditor--"to recover damages caused by the impropriety."

Here Rose was the judgment debtor, and Fultz was the judgment creditor, in a diversity action brought by Fultz in the Colorado federal district court (CT 3, 10, 61). On December 11, 1984, the Colorado Court awarded Fultz a default judgment (CT 10, 61) for a total of $464,000, including $116,000 compensatory and $348,000 punitive damages. Fultz then pursued enforcement proceedings in Rose's home state of California, in the federal district court for the Central District of California (CT 11).

In March 1986, the California District Court ordered the sale of the Rose home to Fultz; that sale was made in April 1986, by a U.S. Marshal's deed executed and delivered on April 8 and recorded on April 9, 1986 (CT 25). Fultz resold the home to Mr. and Mrs. Hawkins (as contemplated in the court order) on May 2, 1986 (CT [unnumbered page between 28 and 29]).

This action makes three basic claims of voidness or impropriety. First, the Colorado default judgment (and the California enforcement proceedings that followed it) were void for lack of personal jurisdiction over Rose (CT 4-11). Second, the execution itself was void or improper, due to multiple violations of the applicable California homestead and execution laws; some of those violations were by the court, but others were by Fultz and not by any court order, including some that violated the court's order (CT 12-

34). Third, Fultz deliberately violated the applicable California automatic statutory stay, under Cal. CCP 916, by proceeding with the sale after Rose had notified her and the Marshal of the stay (CT 24-26).

Rose's complaint named four defendants. Judgment creditor Fultz was the primary defendant. Mr. and Mrs. Hawkins were named as the parties to whom Fultz resold the home (and who could acquire no better rights than Fultz), and also for having conspired with Fultz in her violations of California law. Home Savings was named only as the lender who financed the resale, and whose rights were dependent on those of the Hawkins.

The Hawkins and Home Savings demurred to the complaint (CT 82-106), concluding (CT 104) that their demurrer should be sustained without leave to amend because of the collateral estoppel effect of prior

federal court proceedings. Fultz had answered the complaint (CT 116-35), but made a companion motion for judgment on the pleadings (CT 140-59).

The trial court sustained the demurrer and granted the motion for judgment on the pleadings, both without leave to amend, and signed similar judgments of dismissal, one in favor of the Hawkins and Home Savings (CT 373), and the other in favor of Fultz.

In the unpublished opinion filed 3/5/91 (Appendix A), the Court of Appeal affirmed, holding that Rose's first two claims (based on jurisdictional issues, and on violations of California homestead and execution laws) were barred by federal decisions (Opinion at A 11-13), and that his third claim (for violation of the California automatic statutory stay) lacked merit because the challenged order directed the sale of real estate, so in the

absence of a bond "there was no stay in effect" (Opinion at A 15).

Rose filed a timely Petition for Rehearing on March 20, 1991. That petition was denied by the California Court of Appeal on March 25, 1991, and the California Supreme Court denied Rose's petition for review on May 29, 1991.

B. Rose raised the federal questions below.

The federal questions raised here, including the due process questions, were raised by Rose both in the trial court and in the California appellate courts. Even the non-due process questions are purely federal questions, because the demurrer, and the trial court's ruling on it, was based solely on the res judicata or collateral estoppel effect of federal judgments and orders.

Our main opposition to the demurrer (and companion motion for judgment on the pleadings), in the second paragraph of its

introduction, stated that Respondent Fultz "does not contend that our allegations are insufficient to establish voidness and impropriety, but only that they are barred by previous rulings of federal courts (CT 323; emphasis added).

We raised one of our due process contentions (that a holding of retroactive waiver of voidness of a default judgment, by a post-judgment appearance, violates due process), in the same opposition in the trial court (at CT 337). We stated that the Ninth Circuit order had not said the waiver was retroactive, and "[i]f it had, that would have been a violation of due process." We continued to raise the issue in our briefs (and petition for review) on appeal, but it was rejected at all levels, without any real discussion. For example, the Opinion (of the California Court of Appeal, at A 7) does not consider the issue, but assumes that "a

voluntary general appearance waiving any jurisdictional defect" applies to the original default judgment.

Our other due process contention (that a party cannot be collaterally estopped on issues he could not appeal in the prior proceeding) was also raised in the same opposition in the trial court (at CT 340-41). We stated that interpreting the Ninth Circuit order so as to give collateral estoppel effect to the order appealed from "would violate Munsingwear, contrary to the Ninth Circuit's express reliance on that case, and deny due process to Rose." We continued to raise the issue in a brief in the Court of Appeal, and in the Supreme Court. None of those courts discussed the issue, but all impliedly rejected our contention.

C. Factual and Legal Basis of Jurisdictional Claims

For each of Rose's three basic claims, this Statement will summarize the facts

and the law on which the claim is based, and the extent to which the merits of the respective claim have or have not been ruled on by the federal courts.

We recognize that it is unusual for a Statement of the Case to include a discussion of applicable law, but we submit that it is appropriate and necessary here. The law of the claims (as distinguished from the law of bar by collateral estoppel, which will be discussed in argument below) has generally not been the subject of controversy in this action, and it is necessary to an understanding of the issues that have or have not been submitted to or decided by the federal courts.

1. The default judgment was clearly void when entered.

Respondents have not disputed the facts or the law of voidness, either in the trial court or on appeal. The Complaint alleges facts that mandate the conclusion that the Colorado default judgment was

void for lack of personal jurisdiction, both because process was never served on Rose (CT 4-6), and for lack of territorial jurisdiction under the Colorado long-arm statute (CT 6-11).

The Colorado District Court's conclusion that service of process on Rose was proper (Opinion at A 3) was not just a general reference to Fed.R.Civ.P. Rule 4. Rather, it referred to "Rule 4 FRCP and, specifically, Rule 4(c)(2)(c)(ii) FRCP" (CT 57; emphasis added). Rule 4(c)(2)(C)(ii) provides for service by mail, which requires service by other means "[i]f no acknowledgment of service [on a specified form to be enclosed] is received by the sender within 20 days after the date of mailing."

Rose did not sign or return the acknowledgment form, either within the 20-day period (he could not, because he did not receive it within that period) or

at all (CT 5-6). Rule 4(c)(2)(C)(ii) "plainly states that service fails unless the defendant returns the signed acknowledgment form. Virtually every court that has examined the rule has reached that same interpretation." (Worrell v. B.F. Goodrich Co. (9th Cir. 1988) 845 F.2d 840, 841.

Thus the mailed service relied on by the Colorado Court to support its jurisdiction failed. Mailed service also failed for the other reasons alleged in the Complaint at CT 4-6. Furthermore, process in the Colorado action was never served by personal delivery to Rose (CT 4). In addition to the mailed service relied on incorrectly by the Colorado Court, Fultz attempted substituted service by service on Mrs. Rose at her home; that attempt also failed, because Rose and Mrs. Rose had separated, and he was no longer living there at the time of the attempt,

and also for the other reasons specified in the Complaint at CT 4-5.

The Colorado default judgment was therefore void for lack of personal jurisdiction, due to insufficiency of service of process.

The Colorado default judgment was also void for lack of territorial jurisdiction, for insufficient contacts with the State of Colorado, under the facts alleged in the Complaint at CT 6-10. For example, by the time the alleged tortious acts were committed by Rose (and they were committed outside of Colorado), and by the time the contract Rose was alleged to have breached had been executed (and it was executed outside of Colorado), the only possible damage to Fultz was to money and property that were already in Arizona (CT 7-10). That has been held to defeat Colorado long-arm jurisdiction, in Ruggieri v. General Well Service, Inc. (D. Colo. 1982)

535 F.Supp. 525, 536.

Rose never appeared in the Colorado District Court prior to its default judgment (Complaint at CT 6), which was entered on December 11, 1984 (CT 61), and he did not appeal from the default judgment (CT 349). Thus jurisdictional issues were not actually litigated by Rose, either before the default judgment or on direct appeal from it, so Rose was "free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." Ins. Corp. of Ireland v. Compagnie des Bauxites (1982) 450 U.S. 697, 701.

2. Rose has not retroactively waived jurisdiction, and there has been no preclusive ruling on the merits of his jurisdictional claims.

Since the default judgment was clearly void for lack of jurisdiction when it was entered, the only question on that issue here is whether that voidness has been

retroactively waived by Rose, or whether his claim of voidness is otherwise precluded by later rulings of the federal courts. Neither has occurred.

Rose chose to make his jurisdictional collateral attack on the Colorado default judgment in the California District Court, where Fultz had registered the judgment and was proceeding to enforce it. Rose raised the service of process issue in opposition to a contempt citation, issued by the California District Court for his failure to answer questions (other than on jurisdictional issues) at a judgment debtor deposition. (CT 14-15.) Rose also raised that issue in a motion (in the California District Court) to set aside the default judgment (CT 15), under Rule 60(b)(4).

The California District Court determined the service of process issue against Rose (refusing to give any independent

consideration to the Colorado Court's conclusion, at the time of the default judgment, that it had jurisdiction), in its Order After Contempt Hearing July 15, 1985 (CT 16). However, that order was vacated when the Ninth Circuit's June 1987 Memorandum dismissed the appeal from it as moot (CT 74, 189), so that order of the California District Court has no collateral estoppel effect.

The Ninth Circuit's June 1987 Memorandum (CT 69-74, 184-89) said Rose's post-judgment general appearance "waived any challenge to the Colorado district court's personal jurisdiction over him based on any alleged defect in service" (CT 74, 189). It did not say that the waiver was retroactive, so as to validate the previous default judgment that was entered a full year before the general appearance. It implied the contrary, by stating that "[t]he parties may now pursue this case

before the Colorado district court which now has jurisdiction over the parties and may address the issues on the merits" (CT 74, 189; emphasis added).

Furthermore, if the Ninth Circuit was ruling that the waiver was retroactive, there would be no need for the Colorado Court to address the merits--either of the jurisdictional issues or the action itself--because the default judgment would thereby be validated. Only a holding of nonretroactivity would pave the way for a determination of the merits of the issues raised by Fultz' action against Rose in the Colorado District Court.

In addition to relying incorrectly on the Ninth Circuit's June 1987 Memorandum, the Opinion (at A 12-13) incorrectly concludes that "[l]itigation of the issue of personal jurisdiction was necessary to the final judgment in Colorado and the issue is therefore barred." Aside from

an incorrect definition of "actually litigated" (equating it with "necessarily decided," which is a separate requirement for collateral estoppel, as will be shown in argument below), the Opinion is wrong on the facts as well.

It is not clear which ruling the Opinion refers to as "the final judgment in Colorado," but there were only three rulings in Colorado (two by the district court and one by the Tenth Circuit), and none of the three could possibly preclude a further collateral attack based on lack of personal jurisdiction.

Presumably by "final judgment," the Opinion meant the December 1984 default judgment. That judgment did contain findings of personal jurisdiction, but argument will show that, in the absence of an appearance by the defendant, a default judgment cannot preclude a collateral attack for lack of jurisdiction.

The second ruling of the Colorado District Court was the denial of Rose's motion under Rule 60(b)(1) and (3), for fraud and mistake. That motion (CT 202-08) did not submit the issue of jurisdiction to the Colorado Court; that was the very basis of the Ninth Circuit's June 1987 ruling, so both sides are precluded from contending the contrary. The Colorado court's April 1986 "Order Denying Rose's Motions Under Rule 60" (CT 213-14) did not even mention jurisdiction or service of process.

Rose appealed to the Tenth Circuit from the April 1986 order denying his Rule 60 motion, not from the 1984 default judgment which he never appealed (CT 216, 349). In the last of the three Colorado rulings, the Tenth Circuit affirmed the discretionary denial of Rose's Rule 60 motion, in a brief order of May 10, 1988, the full text of which is as follows:

> "Upon consideration of all the issues raised in this case, we find that the district court did not abuse its discretion in denying the defendant's Rule 60(b) motion. Fed. R. Civ. P. Rule 60(b). All pending motions are denied and the judgment of the district court is affirmed.
>
> "AFFIRMED." (CT 79.)

The pending motions referred to and denied in that order were (1) a motion by Fultz to moot the appeal; and (2) "Rose's Motion to Permit Submission of Voidness [Service of Process] Question to This Court on This Appeal" (CT 217-33). Fultz opposed Rose's Motion, arguing that "Issues not Raised Before the Trial Court are Precluded on Appellate Review" (CT 234, 237-38).

Rose's reply did not dispute Fultz' assertion that the service of process issue had not been raised in his Rule 60 motion below, but asked the Court of Appeals to exercise its discretion to permit it to be submitted anyway, so the entire matter could be determined in the

one appeal that was already before the appellate court. By denying Rose's motion, the Tenth Circuit was refusing to consider the question (which is not even mentioned or discussed in the order), so its order cannot collaterally estop Rose on that question.

The judgment affirmed by the Tenth Circuit was the April 1986 order denying Rose's Rule 60 motion, not the 1984 default judgment that had never been appealed. Under Fed.R.Civ.P. 54(a), "'[j]udgment' as used in these rules includes a decree and any order from which an appeal lies" (emphasis added), so the affirmed "judgment" could only be the order denying the Rule 60 motion.

If the Opinion (at A 7-8) meant to say that the Tenth Circuit affirmed the 1984 default judgment in its entirety, that is a misstatement, both as a matter of fact and as a matter of law. As to the facts,

we have already seen that the 1984 judgment was not appealed; only the 1986 order denying the Rule 60 motion was before the Tenth Circuit on appeal. As to the law, it is established that "an appeal from an order denying relief under 60(b) does not bring up for review the judgment from which relief is sought." (7 Moore's Federal Practice (2d ed. 1991) Para. 60.30[1] at p. 60-330; emphasis added).

D. Factual and Legal Basis of Homestead and Execution Claims

Rose's second basic claim (Complaint at CT 11-34) alleges multiple violations of the California homestead and execution laws. California state law was applicable to the enforcement of Fultz' federal judgment, after she registered it in the California federal district court (CT 11), under Rule 69(a) of the Federal Rules of Civil Procedure, which provides in relevant part:

"[T]he procedure on execution, in pro-

> ceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held, . . ."

1. Rose lost his family home and the homestead exemption, and suffered other damages, due to multiple violations of California homestead and execution laws.

The California homestead laws protect the rights of the owner of a family dwelling, not only by providing for a cash exemption (which was $45,000 at the time Rose's home was taken), but by procedures that ensure an execution sale price that is close to fair market value, and that prevent a sale unless certain requirements are met. The homestead laws are contained in Article 4, sections 704.710 et seq., of the Code of Civil Procedure. California CCP section 704.740(a) provides, in relevant part (emphasis added):

> "[T]he interest of a natural person in a dwelling may not be sold under this division to enforce a money judgment except pursuant to a court order for sale obtained under this article and

the dwelling exemption shall be determined under this article."

Both Fultz and the California District Court ignored the California homestead laws, and deprived Rose of its protections by flagrant violations of those laws. While execution was stayed, Fultz obtained a bid from the Hawkins that she wanted to accept (CT 19), and from then on the Court refused to follow California law, ultimately ordering a private sale to the Hawkins instead of the public sale required by the execution laws (CT 19-23).

Many of the violations were ordered by the Court at Fultz' request, but some were not. For example, Fultz' violations began before any order of the California District Court, and even before the levy on Rose's home. In her instructions to the Marshal before the levy, Fultz failed to notify the Marshal (as required by California CCP 687.010(a)) that the property was a dwelling (Complaint at CT 12). That

would have triggered the homestead provisions of California law, and Fultz' violation of the statute is prima facie evidence that she failed to exercise due care, under California Evidence Code section 669.

Fultz also failed to notice or apply for a homestead hearing (CT 13), and no such hearing was ever held (CT 19). Such a hearing is required and governed by CCP 704.750 through 704.780, and under CCP 704.750(a) the levy on the dwelling must be released in the absence of a timely application.

Rose thereby lost his homestead rights (including all or part of a $45,000 exemption, and other rights that might have prevented a sale altogether); he would have qualified for those rights had a timely hearing been noticed and held (CT 13-14, 30-35). Rose was not aware of those rights until November 1985; he was

by then no longer entitled to homestead rights, by reason of his divorce from Mrs. Rose in October 1985 (CT 14). Even if the March 1986 sale order of the California District Court was correct, Fultz' violations of law damaged Rose, and were not ordered by any court.

Fultz even violated the Court's sale order, and those violations damaged Rose (CT 27-28).

2. Rose's appeal from the sale order was mooted by the transfer to Hawkins, and the Ninth Circuit expressly refused to reach the merits of the appeal.

Rose appealed from the March 7, 1986 order for the sale of the home, but that appeal was dismissed as moot by the Ninth Circuit's order in Fultz v. Rose (9th Cir. 1987) 833 F.2d 1380, which stated:

> "Fultz sold the property to Mr. and Mrs. Hawkins in compliance with the district court's March 7, 1986 order. Because Mr. and Mrs. Hawkins are not parties to this action, we are no longer able to grant any effective relief from that order or to reach the merits of this appeal.

> "In accordance with the Supreme Court's guidance in United States v. Munsingwear, 340 U.S. 36, 39 (1950), we dismiss this appeal and vacate the district court's order entered March 7, 1986. Vacation of the March 7 order shall not operate retroactively and shall have no effect on actions or conduct already undertaken in reliance on or under the authority of that order." (Emphasis added.)

Because of that dismissal, and the reason for it, neither the March 1986 sale order nor the Ninth Circuit's dismissal of the appeal from it has any collateral estoppel effect here. Argument will show that (a) because the Ninth Circuit expressly refrained from determining the merits of the appeal, its order cannot collaterally estop Rose on the issues of this appeal; and (b) the sale order cannot collaterally estop Rose because the mooting of his appeal from it prevented him from obtaining appellate review of that order.

E. Automatic Statutory Stay Claims

Rose's third basic claim (Complaint at CT 24-26) alleges that Fultz deliberately

proceeded with the Marshal's deed of the Rose home, in violation of the automatic statutory stay under California law, made applicable by Fed.R.Civ.P. 62(f).

That claim was the only one decided on the merits by the California Court of Appeal. Its holding was clearly wrong under California law, as Rose pointed out in a petition for rehearing in that court.

However, this claim is not essential to the questions presented in this petition, so it will not be discussed further here.

REASONS FOR GRANTING THE WRIT

The questions presented here involve the law of res judicata and/or collateral estoppel. Here Rose's action relates solely to the execution sale of his property, and thus it does not depend on the merits of Fultz' action against Rose that gave rise to the judgment on which the execution took place. Therefore Rose's cause of action here is not the same as

Fultz' cause of action in the federal courts, and the determinations here must be made under the law of collateral estoppel (issue preclusion), not res judicata (claim preclusion). Cromwell v. County of Sac (1877) 94 U.S. 351, 352-53.

A. The holding that a postjudgment general appearance validates a void judgment retroactively is contrary to law and also violates due process.

1. A void federal judgment may be collaterally attacked in a California state court.

According to 7 Moore and Lucas, Moore's Federal Practice (2d ed. 1991) Para. 60.41[2] at p. 60-417 (footnote omitted):

> "Certainly [Rule 60(b)] could not destroy the power to make a collateral attack in a state court upon a void federal judgment, since the state court need not, and should not, give full faith and credit to a void federal judgment. Since the judgment is a nullity the state court should so adjudge when the validity is appropriately called in question."

Here this California action is both necessary and appropriate. It is necessary because Rose and the Hawkins are

citizens of California, so there is no federal diversity jurisdiction. It is appropriate because this action involves not just California citizens, but California land and homestead laws as well.

A litigant should not be deprived of justice under the law because artificial boundaries--between states, and court systems--require him to question the actions of one court in another. Unless and until the merits of his claims have been finally determined by one of those courts, Rose is entitled to raise them and have them determined. That is what he seeks in this action.

2. Rose's postjudgment general appearance did not retroactively validate the void federal judgment.

Our Statement of the Case showed that the Colorado default judgment was clearly void when it was entered. We also showed that the Ninth Circuit did not state that Rose waived jurisdiction retroactively by

his postjudgment general appearance, and instead implied the contrary. Yet the Opinion (at A 11-13) apparently assumes the waiver was retroactive, without even discussing that issue that Rose raised below and in his briefs on appeal.

We are not aware of any federal law on this subject,[2/] but under the law of

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2/ This statement should now be corrected to say that we are not aware of any federal law since the Federal Rules of Civil Procedure were adopted in 1938; however, an earlier case, Feldman Inv. Co. v. Connecticut Gen. Life Ins. Co. (10th Cir. 1935) 78 F.2d 838, held that improper service had been waived and a judgment validated, both by a prejudgment general appearance and (without discussion of the retroactivity issue) by a postjudgment general appearance. According to 6 C.J.S. 82, Appearances sec. 48, "[t]he authorities differ" on the question of whether a waiver by a general appearance "after judgment may be applied retroactively so as to cure initial defects and render proper an otherwise void judgment." Feldman is one of 25 cases from 11 jurisdictions cited by C.J.S. as permitting such retroactivity, as opposed to 27 cases from 16 jurisdictions that deny retroactivity. See also cases cited in Lurvey, General Appearance After Judgment: The Dilemma of Retroactivity (1968) 19 Hastings L.J. 541.

Colorado (where the general appearance took place), it is clear that the waiver is not retroactive. The Colorado case relied on by Fultz, in her successful motion to dismiss Rose's appeal as moot, expressly held that a judgment void for lack of service was not retroactively validated by a later general appearance. (Weaver Const. Co. v. District Court (Colo. 1976) 545 P.2d 1042, 1046.)

3. A holding of retroactive waiver violates due process.

California law is the same as that of Colorado, by statute. In re Marriage of Smith (1982) 135 Cal.App.3d 543, 549-50, holds that a general appearance did not retroactively cure defective service, and discusses the deprivation of due process inherent in a contrary rule (135 Cal.App. 3d at 549-50; footnotes omitted:

> "[H]ere we are--as fine an example as possible of the quotation above concerning metaphors and how unreflecting use of legal concepts leads to unintended results. The rule be-

> gan as an aid to justice and became one of automatic application, a trap for attorneys who find it difficult to predict safely what the next judge will call a 'general appearance,' depriving unwary defendants of '"The fundamental requisite of due process of law . . . the opportunity to be heard."'"

Rose raised that due process issue below, in the trial court at the first opportunity (CT 337); again in the California Court of Appeal, in his Reply Brief (at 21) and his Petition for Rehearing (at 13-14); and yet again in the California Supreme Court, in his Petition for Review (at 21). He raises it again here; interpreting the June 1987 Ninth Circuit Memorandum to retroactively validate the default judgment is a violation of Rose's rights under the Due Process Clauses of the United States Constitution.

B. The California court's definition of "actually litigated" is wrong.

One of the threshold requirements for collateral estoppel is that the issue to be precluded must have been "actually

litigated" in the prior proceeding. Cromwell v. County of Sac, supra, 94 U.S. at 353. The California Supreme Court has properly defined "actually litigated" as "properly raised, by the pleadings or otherwise, and . . . submitted for determination, and determined. People v. Sims (1982) 32 Cal.3d 468, 484; emphasis in original.

Here the Opinion (at A 12) ignores the Sims definition, although Rose quoted it in his Reply Brief (at 19), and instead opts for a later Court of Appeal definition in Frommhagen v. Board of Supervisors (1987) 197 Cal.App.3d 1292, 1301, fn. 3, emphasis added:

> "Issues are actually litigated if the judgment itself indicates they have been litigated or litigation of the issue was necessary to the judgment."

The Frommhagen definition renders the "actually litigated" requirement meaningless, by confusing it with (and telescop-

ing it into) the separate requirement that the precluded issue "must have been necessarily decided in the former proceeding." Lucido v. Superior Court (1990) 51 Cal.3d 335, 341. The authorities cited by Frommhagen relate to the "necessarily decided" requirement rather than the "actually litigated" requirement.

Apparently the Opinion uses the Frommhagen definition to conclude that, because the Colorado default judgment was accompanied by a finding of jurisdiction, that issue was actually litigated. Such reasoning would prevent any jurisdictional attack on a default judgment, because (expressed or not) any judgment necessarily decides that the court had jurisdiction to render it.

But any defendant who perceives that a court lacks jurisdiction over his person is free to ignore the proceedings, risk a default judgment, and challenge the

judgment in a collateral proceeding. (Ins. Corp. of Ireland, supra, 450 U.S. at 701). That is a due process right. (Id. at 702.)

C. Affirmance of a discretionary denial, of a motion for relief from judgment on grounds of fraud or mistake, does not constitute an affirmance of the underlying judgment.

The Court of Appeal uncritically accepted Respondents' characterizations of the rulings of the federal courts. Those characterizations were not even correct, and certainly were not clear from the rulings, as shown in our Statement of the Case above.

An egregious example is the conclusion (Opinion at A 7-8) that the Tenth Circuit's affirmance of the 1986 denial of Rose's Rule 60 motion also "affirmed the judgment against Rose [apparently referring to the 1984 default judgment, which was not appealed] in its entirety." We showed above (at A 23-24) that this

was not correct on the facts or the law. The law bears repeating here, and review by this Court. According to 7 Moore and Lucas, Moore's Federal Practice (2d ed. 1991) Para. 60.30[1] at p. 60-330:

> "[A]n appeal from an order denying relief under 60(b) does not bring up for review the judgment from which relief is sought."

D. A party cannot be collaterally estopped on an issue that the courts refused to consider in the prior proceeding.

The Ninth Circuit's order in Fultz v. Rose (9th Cir. 1987) 833 F.2d 1380 [cert. denied (1988) 486 U.S. 1056], dismissing Rose's appeal from the sale order, expressly stated that, because the Hawkins were not parties to the Fultz action against Rose, "we are no longer able to grant any effective relief from that order or to reach the merits of this appeal." (Emphasis added.)

Thus the Ninth Circuit expressly refrained from determining the merits of the issues raised by Rose on his appeal from

the sale order, and Rose cannot be collaterally estopped from raising those issues in this action. "[I]f the court expressly refrains from determining an issue, no collateral estoppel results as to that issue. [Citations.] (People v. Huston (1989) 210 Cal.App.3d 192, 225.

Incidentally, even if the propriety of the sale order had been determined by the Ninth Circuit, Rose would still have other claims that are not dependent on the propriety of the order. Among them are the jurisdictional claims, Fultz' violation of law in failing to notify the Marshal that the property was a dwelling, disobedience of the order, and violation of the statutory stay.

E. A party cannot be collaterally estopped on issues that he could not appeal in the prior proceeding. A contrary holding would violate due process.

Even aside from the rule that there is no collateral estoppel on issues the court

refrains from deciding, there cannot be collateral estoppel on issues that could not be appealed in the prior proceeding. It is a due process requirement that the party sought to be estopped must have had a fair opportunity to pursue his or her claim the first time. (Mueller v. J.C. Penney Co. (1985) 173 Cal.App.3d 713, 720.)

Whether or not the appellate court vacates the order appealed from when the appeal is mooted, the denial of the right to appeal (unless it is by the choice or because of the fault of the appellant) denies a fair hearing on the issues of the appeal. Rose raised that due process issue below (CT 341) and again in his Appellant's Opening Brief (at 19).

The Restatement of Judgments (Second), in section 28, says that there can be no collateral estoppel if "The party against whom preclusion is sought could not, as a

matter of law, have obtained review of the judgment in the initial action."

The Restatement rule is especially appropriate here, where Rose was deprived of his right to appeal by Fultz' wrongful transfer of the property to the Hawkins, in violation of the automatic statutory stay.

That rule should be applied whether or not the Court of Appeals has dismissed the district court judgment or order appealed from. According to 18 Wright, Miller & Cooper, Federal Practice and Procedure (1981) sec. 4433 at p. 317, the law is unclear, but "[i]t would be better to adopt a clear rule that preclusion is defeated by dismissal of an appeal for mootness, whether or not formal steps have been taken to vacate the trial court judgment."

That clarification of the law is needed, and should be supplied by this Court in this case.

CONCLUSION

This petition for certiorari should be granted, so these important questions can be decided on the merits by this Court.

Respectfully submitted,

JAMES M. WEINBERG
Attorney for Petitioner
MASON H. ROSE

APPENDIX A

3/5/91 Unpublished Opinion of California Court of Appeal

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION ONE

B045490
(Super.Ct.No. SWC 87250)
[File-stamped] MAR 5 1991

MASON H. ROSE,

Plaintiff and Appellant,

v.

SUSAN T. FULTZ et al.,

Defendants and Respondents.

APPEAL from judgments of the Superior Court of Los Angeles County, Abraham Gorenfeld, Temporary Judge. (Pursuant to Cal. Const., art. VI, sec. 21.) Affirmed.

James M. Weinberg for Plaintiff and Appellant.

Aran & Miller, Kenneth J. Aran, and Jeff Berke for Defendants and Respondents,

Roger E. Hawkins, Christa M. Hawkins and Home Savings of America.

Ferrante & Ferrante and Joseph M. Ferrante for Defendant and Respondent Susan T. Fultz.

Mason H. Rose appeals from two judgments of dismissal, one in favor of Home Savings of America, F.A., Roger E. Hawkins and Christa M. Hawkins following an order sustaining their demurrers to Rose's first amended complaint without leave to amend, and one in favor of Susan T. Fultz following an order granting her motion for judgment on the pleadings without leave to amend. We affirm both judgments.

FACTS

Fultz, a Colorado citizen, retained Rose, a California attorney, to prosecute a wrongful death action after her husband was killed in a helicopter crash. The case settled in June 1980, for approxi-

mately $100,000 and Rose then enticed Fultz to invest $70,000 of her recovery in equipment leases involving restaurants in which Rose had an ownership interest. Rose personally guaranteed Fultz' investments and when the deal went sour Fultz sued Rose in the United States District Court for the District of Colorado. Rose failed to respond and his default was entered. Fultz' motion for default judgment was granted and the Colorado court specifically found that service of process on Rose was proper (Fed. Rules Civ. Proc., rule 4, 28 U.S.C.) and that it had jurisdiction over Rose pursuant to its "long arm" statute.[1] Judgment was entered the same day, awarding Fultz a total of $464,752.62, including punitive damages.

Fultz registered the Colorado judgment

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[1] All further references to rules are to the Federal Rules of Civil Procedure.

in the United States District Court for the Central District of California and began enforcement proceedings. A writ of execution was issued and in March 1985 the writ was levied on Rose's property at 37 Crest Road West, Rolling Hills, California. Rose then filed motions in the California court to set aside the Colorado default judgment for lack of personal jurisdiction (rule 60(b))[2] and to quash the writ of execution.

The California court took Rose's motion to set aside the judgment off-calendar and stayed the action "pending final adjudica-

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[2] As relevant, rule 60(b) provides that: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence . . .; (3) fraud . . .; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . .; or (6) any other reason justifying relief from the operation of the judgment."

tion of the jurisdictional issues by the Colorado district court." Rose failed to appear in Colorado to challenge the finding of jurisdiction, and on July 15, 1985, the California court denied Rose's motion to set aside the default judgment and ordered the immediate sale of the levied property. Rose appealed to the United States Court of Appeals for the Ninth Circuit.

Next, Rose filed a petition for bankruptcy under Chapter 11 of the Bankruptcy Act. Fultz obtained relief from the automatic stay (a ruling which was affirmed on appeal) and a sale of Rose's property was scheduled. Two weeks later, Rose obtained ex parte orders staying the sale to allow him an opportunity to find a bona fide purchaser for the property.

But Rose did nothing to find a purchaser. Instead, while his Ninth Circuit appeal was pending, Rose filed another

rule 60(b) motion in the California court to set aside the same orders from which he was appealing. That motion was denied and Rose filed another appeal which was consolidated with the pending appeal. On December 11, 1985, Rose filed a rule 60(b) motion in the Colorado court in which he offered to admit liability for compensatory damages but sought relief from the punitive damage portion of the Colorado judgment. This motion was denied and Rose appealed to the Court of Appeals for the Tenth Circuit.

The California court denied Rose's motion to release his property from sale and on March 7, 1986, filed its "Order Vacating Stay of Execution, Directing Sale of Real Property to Judgment Creditor, and Directing Distribution of Funds Upon Closing," ordering the sale of the property to Fultz, the payment of $45,000 by Fultz to Rose's former wife to satisfy a homestead

claim asserted by her, and the resale of the property by Fultz to the Hawkins. Rose appealed that order to the Ninth Circuit. His applications to the California court and to the Ninth Circuit for stay orders pending appeal were denied.

On May 2, 1986, Rose's property was transferred to Fultz by Marshal's deed and, thereafter, from Fultz to the Hawkins.

On June 10, 1987, the Ninth Circuit dismissed Rose's consolidated appeals as moot, on the ground that the Colorado court obtained personal jurisdiction over Rose when he filed his rule 60(b) motion in that court without challenging personal jurisdiction, which was a voluntary general appearance waiving any jurisdictional defect. On December 11, 1987, the Ninth Circuit dismissed Rose's appeal from the California court's order of sale as moot. On May 10, 1988, the Tenth Circuit denied

Rose's pending motions, affirmed the Colorado court's denial of Rose's rule 60(b) motion, and affirmed the judgment against Rose in its entirety.

Sometime prior to September 6, 1988, Rose filed the within action in superior court, naming Fultz, the Hawkins and Home Savings as defendants. On September 6, 1988, Rose filed a first amended complaint to set aside the "void and improper" sale of his property, for compensatory and punitive damages, imposition of a constructive trust, an accounting and restitution. All of Rose's claims were based on allegations that the underlying Colorado default judgment was void for lack of jurisdiction and that Fultz, the Hawkins and Home Savings (the Hawkins' lender) had failed to comply with California's homestead and execution statutes.

Fultz moved for judgment on the pleadings and the Hawkins and Home Savings

demurred. The trial court granted the motion and sustained the demurrers without leave to amend on the ground that Rose's claims were barred by the doctrines of res judicata and collateral estoppel. Judgments of dismissal in favor of Fultz, the Hawkins and Home Savings were filed and this appeal followed.[3]

DISCUSSION

Rose contends that his claims and this action "have nothing to do with the merits of Fultz' claims against him the federal action that spawned the execution sale." According to Rose, his claims are based on the "void and improper" sale and this action is one brought pursuant to subdivision (c) of section 701.680 of the Code of

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[3] The facts have been stated in conformance with the usual rules on appeal from orders sustaining demurrers without leave to amend. (Koch v. Rodlin Enterprises (1990) 223 Cal.App.3d 1591, 1595; Coon v. Joseph (1987) 192 Cal.App.3d 1269, 1272; Barker v. Hull (1987) 191 Cal.App.3d 221, 224.)

Civil Procedure to set aside the sale and recover damages caused by improprieties in the sale.[4] We disagree.

Rose concedes that this action is based on his claims that the Colorado default judgment and the California order for sale are void for lack of personal jurisdiction; that the order for sale was void due to multiple violations of California's homestead and execution laws; that even if the order for sale was proper, Fultz

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[4] As relevant, section 701.680 states that: "(c) If the sale was improper because of irregularities in the proceedings, because the property sold was not subject to execution, or for any other reason: [paragraph]) (1) The judgment debtor . . . may commence an action . . . to set aside the sale if the purchaser at the sale is the judgment creditor. . . . Any liens extinguished by the sale of the property are revived and reattach to the property with the same priority and effect as if the sale had not been made. [paragraph] (2) The judgment debtor . . . may recover damages caused by the impropriety. . . ."

Unless otherwise stated, all section references are to the Code of Civil Procedure.

failed to comply with certain homestead and execution laws; and that Fultz proceeded with the sale despite the existence of an automatic stay. These concessions establish that Rose's action is barred.

A.

Rose contends that jurisdictional issues were never actually litigated, and that his claims are consequently not barred by res judicata or collateral estoppel. We disagree.

In Colorado, the court expressly found that service of process and jurisdiction over Rose were proper. Thereafter, Rose appeared for the first time in that action to challenge the judgment by rule 60(b) motion but failed to challenge the Colorado judgment on jurisdictional grounds (rule 60(b)(4)). His failure to do so waived any jurisdictional defect. (Rules 12(b)(2) & (5) & 12(h)(1); Jackson v. Hayakawa (9th Cir. 1982) 682 F.2d 1344,

1347, appeal after remand (9th Cir. 1985) 761 F.2d 525.) Thereafter, the Tenth Circuit affirmed the Colorado court's orders.

Accordingly, the jurisdictional issue has been litigated, is the subject of a final judgment, and Rose cannot relitigate the issue in this action. Collateral estoppel bars Rose's action because that doctrine "precludes the relitigation of 'issues that were actually litigated and determined in the first action. Issues are actually litigated if the judgment itself indicates they have been litigated or litigation of the issue was necessary to the judgment. . . .'" State Farm Mutual Auto. Ins. Co. v. Superior Court (1989) 211 Cal.App.3d 5, 13, fn. 9, quoting Frommhagen v. Board of Supervisors (1987) 197 Cal.App.3d 1292, 1301, fn. 3.) Litigation of the issue of personal jurisdiction was necessary to the final judgment in Colorado and the issue is

therefore barred.

B.

Rose contends that the March 7, 1986, order for the sale of his property was void based on violations of the California homestead and execution laws and that he is entitled to litigate these issues in this case. We disagree.

The March 7, 1986, order of sale is not subject to collateral attack in this action. Rose's argument on this point is not that the California court was without the power to make the order, but that its order was erroneous under state law. If a court has jurisdiction over the subject matter and parties, the order or final judgment is not subject to collateral attack in a later proceeding, regardless of whether it is contrary to statute or otherwise erroneous. (Moffat v. Moffat (1980) 27 Cal.3d 645, 655-656.) Accordingly, this claim is barred.

C.

Finally, Rose contends that this action can go forward because he alleges that Fultz sold the property in violation of an automatic stay. According to Rose, the March 7, 1986, order of sale was automatically stayed pending his appeal to the Ninth Circuit because rule 62(f) and subdivision (a) of section 916, read together, give rise to a stay. Rose is wrong.

Rule 62(f) "entitles a judgment debtor to the same stay in the district court as would be accorded in a state court if (1) the judgment would result in a lien on the property of the judgment debtor and (2) the judgment debtor is entitled to a stay." (Hoban v. Washington Metro. Area Transit Authority (D.C. Cir. 1988) 841 F.2d 1157, 1158; rule 62(f), 28 U.S.C.) Rule 62(f) does not apply here because Rose, the "judgment debtor," was not "entitled to a stay" under section 916 (or

under any other statute).

Subdivision (a) of section 916 provides that, "[e]xcept as provided in Sections 917.1 to 917.9 . . ., the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from . . . ." (Emphasis added.) The exception covered by section 917.4 applies to Rose: "The perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order appealed from directs the sale . . . of real property" unless an undertaking or substitute therefore [sic] is given. The challenged order directed the sale of real property, no undertaking or substitute therefore [sic] was given, and there was no stay in effect.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

SPENCER, P.J.

DEVICH, J.

APPENDIX B

8/4/89 Los Angeles Superior Court
Judgment of Dismissal With Prejudice

[File-Stamped] AUG 04 1989

CASE NO. SWC 87250

JUDGMENT OF DISMISSAL WITH PREJUDICE IN FAVOR OF DEFENDANTS HOME SAVINGS OF AMERICA, F.A., ROGER E. HAWKINS AND CHRISTA M. HAWKINS

MASON H. ROSE, V.,

Plaintiff,

vs.

SUSAN T. FULTZ aka SUSAN THERESE FULTZ AND SUSAN FULTZ-SMALL; ROGER E. HAWKINS; CHRISTA M. HAWKINS; HOME SAVINGS OF AMERICA, F.A., A FEDERALLY CHARTERED SAVINGS AND LOAN ASSOCIATION; AND DOES 1 THROUGH 100,

Defendants.

The demurrer of Defendants Home Savings of America, F.A., Roger E. Hawkins and Christa M. Hawkins ("Moving Defendants") to the First Amended Complaint of Mason H.

Rose, V., having been duly presented to this Court, and all papers filed in support of and opposition to said Demurrer having been considered, along with argument of counsel, Aran & Miller by Kenneth J. Aran for Moving Defendants and James M. Weinberg and Mason H. Rose, V. for Plaintiff, and good cause being shown therefor;

IT IS HEREBY ORDERED that the Demurrer of Moving Defendants to the First Amended Complaint of Mason H. Rose, V. is sustained without leave to amend on each of the independent grounds set forth below:

1. The two claims providing the basis for the First Amended Complaint - (1) that the underlying Colorado default judgment was improperly entered against Plaintiff because the court lacked personal jurisdiction and (2) that the execution sale of Plaintiff Rose's property in California was improperly carried out - were heard and adjudicated against Plaintiff Rose

in prior actions in both California and Colorado. Accordingly, plaintiff Rose is now collaterally estopped from asserting the claims contained in the First Amended Complaint, and each of them, against the Moving Defendants.

2. The facts set forth in the First Amended Complaint fail to state a cause of action against Moving Defendants. Moreover, based upon the court's review of the First Amended Complaint, the demurrer and all documents in support of and in opposition thereto, as well as the arguments of counsel at the hearing, the court finds that Plaintiff is unable to further amend his pleadings to state a valid cause of action against Moving Defendants. This is because the facts provided by Plaintiff Rose clearly show that the subject property was purchased by the Hawkins and financed by Home, respectively, pursuant to a valid Court Order expressly authoriz-

ing the purchase. Accordingly, based upon Rose's own allegations, the acts engaged in by Moving Defendants relating to this matter cannot possibly give rise to liability against Plaintiff Rose. Therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that this action is dismissed, with prejudice, in favor of Moving Defendants Home Savings of America, F.A., Roger E. Hawkins and Christa M. Hawkins, and that said Moving Defendants are awarded their costs of suit herein.

DATED: 8/4/89

/s/ Abraham Gorenfeld
JUDGE OF THE SUPERIOR COURT

APPENDIX C

3/25/91 Order Denying Rehearing, by the California Court of Appeal

OFFICE OF THE CLERK
COURT OF APPEAL
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK

DIVISION: 1 DATE: 03/25/91

RE: Rose, Mason H.
vs.
Fultz, Susan T.
Home Savings of America
2 Civil B045490
Los Angeles NO. SWC87250

THE COURT:

Petition for rehearing denied.

APPENDIX D

5/29/91 Order Denying Rose's Petition for Review, by the California Supreme Court

[File-Stamped] May 29, 1991

Second Appellate District, Division One,
No. B045490 S020519

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

MASON H. ROSE, Appellant

v.

SUSAN T. FULTZ Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

APPENDIX E

UNITED STATES CONSTITUTION

AMENDMENT 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

AMENDMENT 14

1. All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make any law which shall abridge the privileges of immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

. . . .